Bureau of Competition Policy

Statement

NOTES FOR AN ADDRESS BY

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BUREAU OF COMPETITION POLICY

TO THE CANADIAN BAR ASSOCIATION

COMPETITION LAW SECTION

3RD ANNUAL COMPETITION LAW CONFERENCE

AYLMER, QUEBEC

SEPTEMBER 29, 1995

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Introduction

I always welcome the opportunity to speak to the annual Competition Law Conference and this time I would especially like to thank you for choosing a location near Ottawa. This has allowed more staff of the Bureau of Competition Policy to participate, a benefit which we recognized after last year's conference in Montreal.

Today I would like to highlight some of the significant case and policy developments that have occurred since I last addressed you. I am also going to talk about changes that have taken place in the Bureau as a result of the government's program review. I will also outline some initiatives that I intend to pursue in the next year. Finally, I will update you on the amendments process.

The Year in Review

When I spoke to you last September I identified some ongoing case matters that I hoped to see resolved as well as some initiatives I intended to pursue. One of my commitments was to work on revitalizing the Consent Order process. My application under the abuse of dominance provisions concerning certain business practices of Yellow Page Publishers was the first opportunity we had to act on this commitment. The application was filed on September 20, 1994 and the Consent Order was issued on November 18, 1994[1]. This was significant in two respects. First, obtaining a Consent Order in approximately two months from filing should signal that this process can be both quick and effective. This together with the Competition Tribunal's (Tribunal) decision to revise the rules of the Consent Order process, will go a long way towards its revitalization. Second, this was both the first Consent Order sought under a non-merger provision of the Act and the first joint dominance application to be dealt with by the Tribunal.

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[1] *The Director of Investigation and Research v. AGT Directory Limited et al., Competition Tribunal*, CT-94/2, dated November 18, 1995.

Another major development in the non-criminal area is the recent decision of the Tribunal in the Nielsen case[2]. In April 1994, I filed an application under the abuse of dominant position provisions alleging that Nielsen had engaged in a practice of anti-competitive acts relating to the purchase of scanner data from major retail chains, and that these acts had the effect of preventing or lessening competition substantially. The hearings commenced on October 17, 1994. A stay of proceedings was granted pending a motion for leave to appeal to the Supreme Court of Canada by Nielsen of a Federal Court of Canada decision concerning certain privilege claims I made in relation to some documents. The leave to appeal was denied and the hearings recommenced on April 3, 1995 and were completed on April 28, 1995.

In its August 30, 1995 decision the Tribunal found that Nielsen controlled a class or species of business and that it had engaged in a practice of anti-competitive acts, the result of which was to substantially lessen or prevent competition. The Tribunal made an order in this matter that, among other things, prevents Nielsen from entering into a contract which precludes or restricts a supplier of retail scanner data from providing data to another supplier or potential supplier of a scanner based market tracking service.

Apart from the importance of the decision to those directly involved in the market in question, the decision is significant for a number of other reasons. First, it reemphasizes the importance of the abuse of dominance provisions and their application to situations where companies try to prevent the possibility of competitive entry into a market through the use of exclusionary tactics such as exclusive contracts and inducements. Second, the decision is a significant addition to the jurisprudence in the non-criminal area and re-affirms many of the previous Tribunal findings concerning the interpretation of the wording of the abuse of dominance provisions. I was pleased to see that the Tribunal accepted our interpretation of the meaning of "a class or species of business" and its breakdown into product and geographic market components. Finally, the implications of this decision are not limited to the use of marketing data used by the grocery products industry and drug stores, but relate to the use of data in any context. For example, participants in high tech industries cannot control data for strategic and anti-competitive purposes.

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[2] *The Director of Investigation and Research v. The D & B Companies of Canada Ltd., Competition Tribunal*, File CT-94/1.

Another priority matter that I mentioned last year was to seek to increase the level of fines in *Competition Act (Act)* offences in appropriate cases and to actively pursue charges against individuals. I am pleased to report that in the last year we obtained the largest single fine under the misleading advertising and deceptive marketing practices provisions of the *Act*, in the Wolverine Tube matter[3]. We also obtained substantial fines under the ordinary selling price provisions in Color Your World[4] and Suzy Shier[5]. In 1994-95, the average fine for offences under the misleading advertising provisions was $61,000- a threefold increase over the previous year. As to individual charges, in the Calgary Real Estate matter, on October 28, 1994, Royal Lepage Real Estate Services Ltd. and a former vice-president and regional manager were convicted[6] on three counts of horizontal price maintenance. In addition, a former branch manager was convicted on one count.

The Bureau continues to ensure that the provisions of the *Act* are applied to the activities of professional associations where these activities are not expressly authorized by a regulatory agency. A prime example of this is the guilty plea which was entered by the A.Q.P.P.[7] for contravening the conspiracy provisions of the *Act.* The matter involved the cash sale of birth control pills and prescription narcotics, including dispensing fees, in the province of Quebec. A fine of 2 million dollars was imposed under section 45 of the *Act*.

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[3] On October 4, 1994, *Wolverine Tube (Canada) Inc.* pleaded guilty to one charge under section 52(1)(a) of the *Competition Act* and was fined $525,000 in the Supreme Court of British Columbia.

[4] On December 22, 1994, *Color Your World Corp.* pleaded guilty to one charge under section 52(1)(d) of the *Competition Act* and was fined $225,000 in Quebec Court (Criminal Division) in Montreal.

[5] On July 17, 1995, *Suzy Shier Limited* pleaded guilty to a charge laid under paragraph 52(1)(d) of the *Competition Act* and was fined $300,000 in the Criminal Division of the Court of Quebec in Montreal.

[6] *Queen(DIR) v 41813 Alberta Ltd.*, previously known as Roberts Real Estate Co. Ltd. in the Court of Queen's Bench of Alberta, Action No. 9201-1336c6.

[7] *Queen(DIR) v. Association of Professional Pharmacists of Quebec*, Superior Court of Quebec, File No. 500-27-008234-900, dated May 19, 1995.

As you may be aware, on Wednesday I announced that a record fine of 2.5 million dollars had been levied against Canada Pipe Company Ltd. Canada Pipe pleaded guilty to one count of conspiracy to have a major American competitor, U.S. Pipe and Foundry Company, to exit the Canadian market. The decision is significant in that a portion of the fine was designated as the company's contribution to the cost of the Crown's investigation and legal services. As well, this matter proceeded with extensive cooperation from the U.S. Department of Justice. The open discussion and exchange of information between the two agencies was important to the resolution of this matter. I would also like to make specific note of the assistance provided by Barbara Brown and Bill Oberdick of the Cleveland Office of the U.S. DOJ. This is a clear example of how cooperation between anti-trust agencies can clearly benefit the Canadian economy.

There was a significant development in the merger area as well. On August 8, 1995 the Federal Court of Appeal issued its decision on the appeals filed against the Tribunal's decisions in the Southam matter[8]. The decision, on our appeal of the Tribunal's dismissal of the applications with respect to print retail advertising markets served by the North Shore News and the Vancouver Courier and the print real estate advertising market in the Lower Mainland of British Columbia, is very important for the Bureau in many respects. In overturning the Tribunal, the Federal Court of Appeal re-affirmed the relevant market tests which are used by the Bureau and set out in the Merger Enforcement Guidelines. The Court of Appeal concluded, as we had argued, that the Pacific Press dailies and the community newspapers were in the same relevant market. The Court of Appeal also found that the Tribunal had focused too much on one indicator of the lack of competition, namely the lack of evidence of price sensitivity, and had ignored other types of evidence which revealed the existence of competition.

In a second decision, the Federal Court of Appeal dismissed Southam's appeal of the Tribunal's remedies decision ordering the divestiture of either the North Shore News or the Real Estate Weekly. The Court of Appeal rejected Southam's arguments, finding that the Tribunal was required to assess the effectiveness of the alternative remedies proposed, and held that notions of economic harm or inconvenience were irrelevant to the decision making process.

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[8] *DIR v. Southam Inc. et al*, Federal Court of Appeal, File No., A-1093-92 and *Southam et al v. DIR*, Federal Court of Appeal , File No. A-1668-92.

Another significant development on the merger front was the first use by the Bureau of the Interim Consent Order provisions of sections 100 and 105 of the *Act*. On December 23, 1994, Quebecor Printing Inc., notified me of its intent to purchase certain assets from Rogers Communications Ltd. On January 16, 1995 the Competition Tribunal issued an Interim Consent Order in response to my application[9]. The Order allowed Quebecor to make the acquisitions but required that the acquired businesses be maintained separate by Quebecor from its other operations for a period of 21-days. The application was intended so to allow completion of my assessment of the competitive impacts of the transaction. After a detailed examination, I announced on February 7, 1995 that I would not challenge the transaction. This was the first time these provisions were used, and it brought to light some deficiencies in the provision. There is also some question about the use of this provision as a hold separate mechanism. While the provisions adequately dealt with the circumstances in this case, where the parties to the proposed transaction did not wish to provide adequate time for the Bureau to review the proposal, it does not provide a mechanism for me to compel production of the information that was required from the parties. In the future I will be inclined to use other tools at my disposal should similar circumstances arise.

Still in the merger area, a matter that has received considerable press in recent weeks is that of the proposed AMOCO/Home Oil transaction[10]. On August 3, 1995, I issued an Advanced Ruling Certificate in respect of the proposed transaction under section 102 of the Act. Shortly thereafter, I received new information which raised some concerns as to the competitive impact of the proposed transaction and we pursued an examination of these issues. This is indeed what the *Act* allows for. Section 103 prohibits me from applying to the Tribunal under section 92, in respect of a transaction for which an ARC was issued and that is substantially completed within one year, solely on the basis of information that is the same or substantially the same as the information on which the certificate was based. This was clearly not the situation in this case. Since the *Act* was passed in 1986 there have been over 700 ARCs issued and this is the first time that the Bureau has received new information that has raised a concern with a transaction in which an ARC had already been issued. I do not think that this signals the demise of ARCs.

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[9] *DIR v. Quebecor Printing Inc., Competition Tribunal*, File CT-95/01.

[10] On September 9, 1995 it was reported that more than 84% of the shares of *Home Oil Ltd.* had been tendered to *Anderson Explorations Ltd.*

In another merger matter the ability and appropriateness of dealing with competition concerns through the use of undertakings was severely tested. On September 24, 1990, Ultramar Canada Inc. provided undertakings concerning the continued operation of the Eastern Passage Refinery that it acquired as part of the divestiture of assets required in the Imperial/Texaco merger[11]. One of the provisions of the undertaking required that Ultramar continue to operate the refinery for a period of at least seven years from the date of purchase, "barring a material adverse change". In May 1994, Ultramar provided notice there had been a material adverse change and that the operation of the refinery would be discontinued. On July 18, 1995, my preliminary views, that there had been a material adverse change, were provided to interested parties for comment before I made a final decision on the issue. Legal actions were initiated by the Atlantic Oil Workers (AOW), the union representing workers at the refinery and by the province of Nova Scotia, as represented by the Attorney General of Nova Scotia.

The AOW filed a motion with the Competition Tribunal requesting that the Tribunal take jurisdiction over the undertakings as part of the original Imperial/Texaco matter. The Tribunal, in denying the motion, concluded that it had dealt with the competition concerns raised in the Atlantic market with its order to divest the assets and that the order gave the Director the role of approving the purchaser of those assets[12]. Furthermore, the decision of the Tribunal recognized that I could deal with competition concerns in a number of ways, including the acceptance of undertakings. As for the motions of the Attorney General of Nova Scotia, the Federal Court of Canada dismissed both applications[13]. In dismissing the application for prohibition on the issue of bias, the Court concluded that the Director was executing an administrative function, as opposed to a judicial or quasi-judicial function, and was not subject to the reasonable apprehension of bias standard. It held in any event that there was no bias and further that while there was no such duty owed given the nature of the function, there was no violation of any duty of fairness. In the second application for mandamus, the Federal Court concluded that there is general public duty on the Director by virtue of the *Act* to consider Ultramar's submission that a material adverse change has occurred in light

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[11] *DIR v. Imperial Oil Limited et al., Competition Tribunal,* CT-89/3, February 6, 1990.

[12] *DIR v. Imperial Oil Limited et al., Competition Tribunal,* CT-89/3, November 4, 1994.

[13] *The Attorney General of Nova Scotia v. Ultramar et al,* Federal Court of Canada Trial Division, dated August 31, 1995, File: T-2603-94.

of the available evidence, including that provided by interested parties. The Court also stated that whether legal action is taken by me to enforce undertakings is within my discretion and that it not for the Court to order if or how that discretion should be exercised.

While these challenges to my ability to resolve concerns by way of undertakings have not been successful, the use of undertakings is still seen by many as an inappropriate manner to deal with competition issues arising from mergers. While undertakings are normally made public, the evidence supporting the conclusions of the Director and the positions of the parties, of necessity, remains largely confidential. This leaves the correctness of the decision open to question by those not privy to all the information. Thus, as I have stated in the past, I continue to prefer the use of consent orders which allows for greater openness to the public.

The most active business sector for the Bureau in the year since I last addressed this group is that of telecommunications and broadcasting. At that time the Canadian Radio-Television and Telecommunications Commission (CRTC) had just rendered its decision (CRTC 94-19) on a new telecommunications regulatory framework. Since then the Bureau has participated in several other matters before the CRTC, the most significant being the public hearing on Information Highway issues. On May 19, 1995 the Commission issued its report to the government, adopting a pro-competitive framework for convergence and the development of Canada's Information Highway. Perhaps most significantly, the CRTC's report accepted that the public interest would best be served by the development of competition in the distribution of broadcast services, which has been provided by the cable industry on a monopoly basis. In particular, the Commission accepted my recommendation that there should be no mandated period of transition to protect the cable monopolies. The Commission indicated that it is prepared to grant broadcast distribution licenses to the telephone companies, conditional upon the completion of regulatory reforms necessary to allow for competition in the provision of local telephone service. I concur with the CRTC's course of action, provided that it can complete the process of regulatory reform within the 12-18 month time set out in its report.

In addition, Government policy for Direct-to-Home (DTH) satellite distribution, as reflected in its directions to the CRTC concerning DTH licensing, strongly endorses the principle that there should be competition in the distribution of broadcast services. I appeared as a witness before both the Senate and House

Committees on DTH and was particularly gratified that the Senate report adopted a number of the positions which I had put forth at the hearings[14]. Many of these points appeared in the Government's subsequent directives aimed at promoting a dynamically competitive market for DTH services. For example, the directives provide that the impact of new entry on other market participants is not to be a criterion in the awarding of DTH licences. This is significant support for the principle of relying on market forces to determine participation in the provision of broadcast services.

Another industry in transition is that of power generation. This year, I intervened in an Electricity Market Structure Review conducted by the B.C. Utilities Commission[15]. The purpose of this review is to provide policy advice to the B.C. Government regarding the benefits of, as well as options for, further opening the province's electrical network. My submission examined various technological and other developments that support movement toward a more open and competitive market structure in the B.C. electricity industry. The final argument, submitted on June 14, 1995, reviewed various structural requirements for effective competition in electricity markets and stressed the role that competition policy can play in facilitating the transition to a competitive market. This intervention followed a similar intervention in proceedings in Ontario considering the future of Ontario Hydro[16].

A commitment that I made last year in the international area was to update the existing relationships with other anti-trust agencies to make them more in tune with the globalization of trade that has and is continuing to develop. A key development in this area occurred when the Minister of Industry, the Honourable John Manley, signed a new Agreement, on August 3, 1995, between the Government of Canada and the Government of the United States of America

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[14] See the Report of the Standing Senate Committee on Transportation and Communications on the Governor in Council Direction orders to the Canadian Radio-television and Telecommunications Commission, First session, 35th Parliament, June 1995.

[15] The B.C. Utilities Commission announced on September 12, 1995 that it had completed its Report on the British Columbia Electricity Market and that the report had been sent to the Minister of Energy, Mines and Petroleum Resources for B.C.

[16] See *The Report of the Board*, Ontario Energy Board, dated August 31, 1994, H.R. 22, in the Matter of a Reference from the Minister of Environment and Energy respecting Ontario Hydro's Restructuring and Proposed Electricity Rates for 1995.

Regarding the Application of their Competition and Deceptive Marketing Practices Laws. The new Agreement replaces the non-binding Canada/U.S. Memorandum of Understanding which was concluded in 1984. The Agreement builds on the 1984 MOU by improving the notification, consultation and dispute avoidance provisions. It also contains several new provisions committing the two governments to more extensive cooperation in the enforcement of their competition and deceptive marketing practices laws. I would refer you to my remarks delivered at the joint session of the CBA and the ABA in Chicago for more detail on the new agreement[17].

The final topic I would like to discuss in my review of the Bureau's activities is the new Bulletin on Strategic Alliances. Given the increasing number of types of business organization in today's economy, I was concerned that uncertainty about the application of the law to various business arrangements not impede beneficial forms of cooperation. So, it was important to me that a clear statement on strategic alliances and the *Act* be released. I also wanted to make sure that its intended audience find the document useful. I am therefore extremely pleased with the process that was followed in this instance. The comments I received on the drafts illustrated the effectiveness and value of informed consultation. Most of them supported the need for such a bulletin and have been quite positive regarding the changes incorporated into the second draft. I appreciated receiving the many useful comments which made the second draft more helpful to its audience without losing the essential message I wanted to communicate. The document is at the printers at this time and so you will receive it soon.

The Changing Bureau

Last year at this time, the Government was in the process of completing its program review, a ground up examination of federal government programs to determine their continued relevance, to identify operational and legislative efficiencies and to reduce overall fiscal burden on the economy. This review had specific consequences for the Bureau, not only as a result of the overall departmental review, but also as it examined its own operations.

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[17] Notes for an Address entitled *International Antitrust, The Canada-U.S. Context* by George N. Addy, to the ABA Section of Antitrust law, annual Meeting, Chicago, U.S.A. August, 6, 1995.

As part of our portion of the program review exercise, we reviewed our enforcement operations. When we looked at the decentralized structure of the Marketing Practices Branch, we realized that a centralized Branch, like the other enforcement Branches, would contribute most to the focusing the Branch's enforcement activities on those matters of the highest priority. As a result, the Bureau has closed its regional operations. We are now in the process of staffing the new positions in the Headquarters operations of the Branch. The restructuring of the Marketing Practices Branch operations will allow for better priority setting in the Branch and will also position the Branch to be integrated more fully with the rest of the organization.

The closing of the Bureau's regional operations also meant we also had to look at complaint handling. The regional offices were an entry point for complaints the Bureau would receive. Now, however, a centralized complaints and information unit, the Complaints and Public Enquiries Centre, has been created to receive all public complaints and information requests. While previously only an estimated 38% of Canadians had toll free access to the Bureau, the new 1-800 number will provide all Canadians free and easy access to the Bureau. I expect that the Centre will be functioning at complete capacity in the next few weeks. It is currently receiving close to 900 complaints and information requests per week and the volume of requests is on the increase. At the present rate of growth, we expect to receive over 50,000 requests for service over the next year, an increase of almost 20% over last year. To reach the Centre, just call 1-800-348-5358.

The departmental program review exercise also resulted in responsibility for Industry Canada's Consumer Products Directorate being transferred from the former Bureau of Consumer Affairs to the Director of Investigation and Research. The Consumer Products Directorate enforces and administers legislation that protects and assists consumers by promoting fairness in the marketplace: the *Consumer Packaging and Labelling Act, the Textiles Labelling Act,* and *the Precious Metals Marking Act.*

Legislative changes will be required before we can proceed with any potential integration of our activities. For now, and until we have given the matter more thought, the two organizations are being held separate. Although it reports to me, the Consumer Products Directorate is not part of the Bureau. There will be no co-mingling of my responsibilities under the *Act* and those with respect to the labelling legislation. This separation is necessary to avoid any real or potential conflict that might arise due to the overlap in the respective mandates of the *Act*

and the consumer protection legislation. In addition, the stringent confidentiality provisions of the *Act* require it.

While the cut to our budget for the current year was ultimately lower than was initially indicated, the effect of the reductions from the program review exercise is only one part of the equation straining our enforcement capabilities. In recent years, major sections of the economy, which were previously regulated, have become open to competition and therefore fully subject to its provisions. In order to make the most effective use of our resources, we implemented case screening criteria to identify priority cases. These measures were implemented at that time because we realized that our resources were not sufficient to pursue all the cases of merit.

I mentioned earlier that the Bureau has devoted considerable time and effort in the last year in the area of telecommunications policy. There are a number of industrial sectors including telecommunications, broadcasting, transportation and agriculture where major changes in the marketplace have or may take place. We have, for example, devoted time to the review of initiatives that the Government is currently undertaking of the *National Transportation Act* (NTA). Bill C-101 is currently before the House of Commons and provides for the further deregulation of the transportation sector[18]. The proposals will result in some areas where responsibility is currently shared between the NTA and the Act, such as merger review, becoming the exclusive domain of the Bureau.

Yet another example of an industry in transition that may soon be absorbing more Bureau resources is the financial sector. The Standing Senate Committee on Banking Trade and Commerce released an Interim Report in August 1995 on the federal financial institutions legislation. The legislation studied comprised the *Bank Act*, the *Trust and Loan Companies Act*, the *Insurance Companies Act* and the *Cooperative Credit Associations Act*. Each of these four statutes were adopted in 1992 and contain a sunset clause which will come into effect in 1997. While this is only one level of the examination of the structure of financial institutions in Canada, the Senate Committee report, while not including specific recommendations, is strongly supportive of competition policy goals. It seems likely that as these sunset dates approach we will not only be involved in the

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[18]Bill C-101 is entitled *"An Act to continue the National Transportation Agency as the Canadian Transport Agency, to consolidate and revise the National Transportation Act, 1987 and the Railway Act and to amend or repeal other Acts as a consequence"*.

examination of the various regulatory regimes, but may also find that more and more activities of financial institutions are removed from regulation and become fully subject to the provisions of the *Act*. As these industries continue the move towards competition, the demands on the Bureau will continue to increase.

Without sufficient resources to meet these new demands, the Bureau's ability to continue to pursue all the cases that we believe are significant will be compromised. If this situation persists it can only result in the Bureau pursuing fewer cases. This resource squeeze may be mitigated to some extent should the proposed amendments concerning the opening up of the Tribunal to private actions be made law, but private access alone will not solve the problem.

I want to take the next few minutes speaking about the philosophy behind our enforcement policies and practices. Our enforcement of the reviewable matters provisions, and most particularly the merger provisions, has been characterized by an approach of voluntary cooperation. This has included the voluntary disclosure of proposed mergers that are not required to be notified, and the voluntary provision of information relating to both notifiable and non-notifiable transactions. We have also witnessed cooperative information disclosure in relation to practices arising under the other reviewable provisions of the *Act*.

In the case of merger review during the past few years, the voluntary process has worked for the majority of cases, typically the ones that do not raise any concern or where concerns were quickly alleviated after obtaining additional information from parties or from third parties. These represent more than 90% of all transactions examined in the Mergers Branch. However, when transactions raise *prima facie* competitive concerns, or when additional information fails to alleviate those concerns and my staff ask for more specific and strategic information, we have seen cooperation fade and fade fast.

For example, I am aware that some counsel advise their clients to take a very narrow view of the voluntary information requests that we send out in the course of our examinations. And in every merger case that we have brought before the Tribunal we have obtained, during the discovery process, documentary information that we believe should have been made available during the course of our preliminary examination of the matter.

Accordingly, to ensure the effectiveness of our review process we have recently felt it necessary to use the provisions of section 11 in the course of some merger examinations. Previously we found, by requesting parties to respond to information requests as though they were made under section 11, an improvement in the quality of information provided to us. Counsel not only provide their usual competition brief, but counsel will also provide corporate documents and more factual information. In one case, orders under paragraphs 11(1)(a) and (b) were used to obtain information that parties to transactions had refused to provide. These provisions have also been used in a civil abuse examination and most recently we have conducted the first section 15 searches in respect of a non-criminal provision of the *Act*.

In the absence of open, voluntary cooperation by the parties it will always be necessary to occasionally use formal powers to maintain the effective enforcement of the *Act*. However, these instances in no way spell an end to our traditional, compliance oriented approach. Each situation will be examined on its own merits to determine whether formal powers are necessary. If, as experts in this field of law, you believe, as I do, that voluntary cooperation is an important feature of the Canadian model then you must also reflect that in your actions and your advice to your clients. As important as voluntary cooperation is, I will not let a question of process, no matter how attractive, put the fulfillment of my oath of office at risk.

The Year Ahead

In looking at the year ahead I believe that the most important single activity for the Bureau and for Canadian competition policy will be the amendments process that we are presently undertaking. However, before dealing with amendments, I would like to touch on some important initiatives that the Bureau will be undertaking in the year to come.

In the fall I will again be consulting on the subject of cost recovery. With the enactment of the *Industry Canada Act*, we now have the authority to proceed with cost recovery for Bureau services. As part of this process we recently undertook an examination of the Program of Advisory Opinions was undertaken. I will be sharing with you the changes I propose to make to this program but today I would simply say that Advisory Opinions will be included in the cost recovery initiative.

I will continue to issue statements and papers to explain my policies and position on matters of importance to competition law enforcement. For example, I will be issuing a statement this fall to provide the legal and business communities with my views on Corporate Compliance Programs.

Another subject I intend to address in the coming months is the area of private actions. With the increase in the number of private actions in recent years, I believe that it is important for me to articulate the role and responsibilities of the Director in respect of section 36 civil actions. Cases such as the decision in the A.Q.P.P. matter in Quebec have raised the profile of the provisions of section 36 of the *Act*. It is important, therefore, that counsel and the business community understand what I believe my obligations are in respect of these matters and what assistance the Bureau can provide.

I intend to continue to devote significant resources to our information and communications activities. In the year ahead, in an effort to further increase the transparency of and accountability for the decisions taken, I will launch a quarterly publication. This report will build on the Annual Report in that it will provide more timely information to you and your clients on such matters as recent case decisions, interventions that the Bureau made and forthcoming initiatives. As well, this new report will include highlights from recent speeches that members of the Bureau have given.

I mentioned earlier the use of section 11 examinations in merger matters. Their use in the Canmar/Cast examination has resulted in a considerable number of interesting decisions surrounding this procedure, both from the presiding hearings officer and Mr. Justice Farley of The Ontario Court (Commercial Division)[19]. These decisions provide valuable guidance on many issues such as the sealing of application materials, the various claims of privilege and their use, the rights of counsel for a competitor to attend examinations conducted under section 11, and access to the transcripts of testimony during the conduct of an examination. In the next few months we will be examining these decisions in detail and will review our policy and procedures in relation to such examinations accordingly.

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[19] See for example *Peter Raimondo v. DIR,* Ontario Court (General Division), Commercial List No. B55/95.

In the area of international agreements work is currently underway to forge closer links with our other major trading partners. In this regard, negotiations towards a formal bilateral agreement between Canada and the European Union are at an advanced stage and I hope to have a Canada/EC MOU in place soon. Those of you who follow world antitrust developments will already know that the need for better cooperation amongst competition agencies is receiving increasing attention globally.

The Bureau will also be continuing its evolution in the area of technology. We will continue to examine our procedures to identify areas that can benefit from the use of new technology. For example, we will be continuing to develop our expertise in the area of electronic searching. In that regard, I note that you are examining the issues surrounding the process of electronic searches in Bureau investigations. In fact, I would like to suggest that the dialogue between us could be extended in this area. The Bureau would be pleased to participate directly in your examination of this matter such that all parties benefit from this process. I believe this type of working together on issues is an obvious next step for our relationship.

Proposed Amendments

As most of you know, I issued a discussion paper on amendments to the *Act* on June 28, 1995. The paper proposed amendments in eight separate areas that, overall, will promote quicker and more effective resolution of competition issues, better equip Canada to deal with anticompetitive and deceptive practices that originate outside the country, and address the problem of deceptive telemarketing.

I look forward to receiving the CBA Competition Law Section's comments in the very near future. I want to commend you for the hard work I know the subcommittees have done so far. Some of you, in your personal capacities, have already provided useful feedback during focus groups which were held in July and August on the subjects of prenotification and confidentiality and international cooperation.

As you know, I extended the period for comment from stakeholders from the original deadline of September 15 to October 6, 1995 to accommodate those parties who wanted to comment but indicated they required more time to do so. To assist me in developing recommendations to the Minister, I am setting up a

Consultative Panel, chaired by Ed Ratushny, Q.C., which will include representatives of stakeholders affected by the operation of the *Act.* The Panel will review possible solutions to issues arising from the discussion paper and advise on the suitability and feasibility of the proposals and alternatives.

I remain committed to a process which would see introduction of a bill in Parliament next Spring. I should also note that the Minister of Industry has asked the House of Commons' Industry Committee to consider the problem of deceptive telemarketing by holding hearings this fall on the subject.

Prenotification

Some of the comments we have received on the subject of prenotification have been to the effect that our proposal represents too significant a change to a process that, fundamentally, works well through a practice of voluntary cooperation. While I agree that the current system works reasonably well in many cases, there are problems that, from our perspective, need to be addressed. The most pressing of these relates to the type and quality of information that is available to us in respect of proposed transactions.

It is common knowledge that the information currently required by the prenotification provisions is inadequate to allow us to determine the impact of what is proposed, particularly in cases where competition issues appear to exist. In addition, we are concerned that the existing waiting periods to not provide sufficient time for us to conduct our analysis in such cases. While voluntarily supplied information has been used in the past to bridge the information gap, we have reluctantly come to the conclusion that reliance on such informal measures is not always adequate or efficient for the reasons outlined.

Our goal in the amendments exercise is to improve the prenotification process -- shorten review times within the Bureau, reduce the provision of irrelevant information and provide greater certainty. We assume this objective is in the interest of the parties to the merger as well. While the same level of detail may not be necessary for every filing, at the end of the day, the availability of relevant, reliable and accurate information early in the process is critical to our ability to make well-founded and timely decisions where issues do arise. This concern is fundamental to an understanding of our prenotification proposal. This means of course that the time spent before filing will be more focused than in the past.

Mutual Assistance and Confidentiality

As business activity transcends national borders, it is essential that Canada not become a haven for foreign-based anti-competitive offences by permitting parties to hide behind our borders when it comes to law enforcement. By all means, businesses should take advantage of the economic benefits of competing in foreign jurisdictions. However, they shouldn't then be insulated from the consequences of their actions in the event they run afoul of reasonably-based foreign competition laws.

The evidence clearly supports the fact that there is a need for this increased cooperation. For example, in 1994-95 my office has received almost twice as many formal notifications under the provisions of bilateral agreements, than it did in the previous year. There has also been a noticeable increase in the number of notifications that we have sent to foreign jurisdictions.

As you know, comments on the 1994 draft Information Bulletin on the treatment of confidential information under the *Act* reflected a broad range of views on the question of statutory confidentiality limits and policy options on information sharing with foreign counterparts. Given the importance of effective transborder competition law enforcement and the questions that were raised as to my ability to cooperate with foreign competition law agencies, I recommended to the Minister that legislative amendments be considered to clearly establish a framework for gathering and communicating information in appropriate circumstances, including in the international context.

Mutual legal assistance with foreign competition law agencies is a key component of the amendments package. A consistent theme in my public remarks since becoming Director has been that economic and enforcement realities are such that we must strive to find ways to combat anti-competitive acts which transcend borders, harming Canadians. Information sharing is one means of achieving this end.

I have found one position expressed by many legal commentators during our consultations to be particularly noteworthy. These relate to concerns about the potential scope of information exchanges, focusing on how to limit the Director's discretion to communicate information to foreign competition law agencies.

These comments were made from the point of view of counsel for potential targets of investigations under the *Act*. This is curious since I know that at least some counsel also represent complainants alleging they have been harmed by the practices of their competitors. One presumes that, if one were to ask complainants whether the ensuing investigation should be stopped at the border, one would get a resounding "no -- do your job and don't let multinational companies hide behind international frontiers". Yet some counsel, who admittedly also represent potential targets in other matters, appear to be arguing against this from a public policy standpoint.

In a speech to the Canadian Manufacturers' Association on March 7, 1995, I urged members in their role of providing input on public policy to have regard not merely to domestic issues but also the broader global environment, which was key to their members' and this country's economic success. I would simply reiterate the same broad vision to you.

Misleading Ordinary Selling Price Claims

Section 52(1)(d) seeks to ensure that representations as to savings off ordinary selling prices are genuine. Sales in which fictitious savings are being claimed are prohibited. As you know the Bureau has, in the past, made a concerted effort to bring its views of the requirements of the law to the attention of the bar and the advertising community[20] and recent cases have not signaled a change in how the Bureau should interpret them or enforce them.

To the extent that representations regarding ordinary selling prices lose their legitimacy in the eyes of the consuming public through abuse, there is a danger that the effectiveness of this powerful form of marketing will be diminished. We have already seen some evidence to this effect.

We have not ruled out adopting an equally effective alternative test that adequately reflects marketplace reality, where its effectiveness can be demonstrated to us, although we have concerns about any test that would permit as the general reference point a price at which no or perhaps very few sales have

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[20]We have done so through a variety of means: the Director's Annual Report for 1967; the May 1977 issue of the *Misleading Advertising Bulletin*; the 1991 *Misleading Advertising Guidelines*; the *Misleading Advertising Bulletin*, issue 2 of 1994 and, most recently, in vol. 1, issue no. 2 of *Competition Communiqué*.

been generated without some further indicia that it is a bona fide market price. Any such test should be able to support prosecutions similar to those undertaken in recent years, which we see as examples of some of the more egregious abuses.

We are also examining whether this provision need be clarified to ensure better transparency and certainty for the advertising community as well as the efficacy of the additional exemptions to s. 52(1)(d) proposed by some commentators. Such exemptions could permit greater flexibility in respect of price-related claims while ensuring they are accurate.

Conclusion

In conclusion let me review the key messages that I wish to leave you with today.

Firstly, after raising last year some concerns that I had surrounding the dialogue between my office and the CBA, I am pleased to note that it has improved greatly in the past year. This is evident in the nature of the comments provided for the Strategic Alliances Bulletin.

Secondly, I hope you will take note of the proactive approach the Bureau has taken in the past year in areas such as proposing amendments, the public information initiatives, and the use of technology. In this regard I look forward to receiving your comments on the amendment proposals. I have suggested that the dialogue between us could be extended in that the Bureau would be pleased to participate directly in your examination of electronic searches. I believe working together on this type of issues is an obvious next step for our relationship.

Thirdly, I wish you to be aware of and understand that there will always be a need to fine tune, constantly, the balance between vigorous enforcement and the compliance approach. Increased use of formal powers, especially in civil examinations will continue, at least until we are more confident of the adequacy of voluntary disclosure. The recent experience of the Bureau has shown that this is an effective method for obtaining all relevant information necessary to properly assess a matter and the time and resources required to invoke formal powers decreases with each instance.

In closing let me thank you for this opportunity to provide you with some of my thoughts and experiences in this fascinating area of the law. Addy 9-e